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No. 85-3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ATLANTA GAS LIGHT COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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for the Eleventh Circuit

This case presents one narrow issue: should this Court's ruling in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), be given retroactive effect? The parties agree that this issue controls this case, and the relevant facts are uncomplicated and undisputed. The court below applied *Newport News* retroactively by affirming the order of the district court that required the petitioner, the Atlanta Gas Light Company (hereafter the "Company"), to reimburse male employees for pregnancy-related expenses incurred by their wives before the date of the *Newport News* decision. In its petition for a writ of certiorari, the Company argued in part that the decision by the court of appeals was inconsistent with decisions by this Court, including *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073

(1983). This brief will address several assertions made by the respondent, the Equal Employment Opportunity Commission (hereafter the "EEOC"), in response to this argument.

1. This Court's Decision in *Newport News* Established a New Principle of Law That Had Not Been Clearly Foreshadowed.

As the EEOC recognizes, the three-part test announced in *Chevron Oil Co. v. Huson* governs whether the *Newport News* ruling should be made retroactive. The first factor in the *Huson* test directs a court to consider whether "the decision to be applied nonretroactively [establishes] a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106 (citations omitted). The EEOC argues that *Newport News* established no new principle of law because it had been foreshadowed by the rulings of other federal courts. Brief for the Equal Employment Opportunity Commission in Opposition at 8-9 (hereafter the "EEOC Brief"). Specifically, the EEOC claims that the case law developed before this Court's decision was merely "conflicting" and that there was only "some confusion on the part of the lower courts." *Id.* at 12.

These claims do not accurately summarize the state of the case law on June 20, 1983, the date of the Court's decision in *Newport News*. By that date, two circuits and five district courts had held that an employer could lawfully exclude pregnancy coverage from a comprehensive health insurance plan for employees' dependents, as the Company had done. See Petition for Writ of Certiorari at 11-13 (hereafter the "Petition"). One of these courts was the district court be-

low, which had held in 1982 that the Company's health insurance plan did not violate the Pregnancy Discrimination Act of 1978, codified at 42 U.S.C. §§ 2000e(k) & 2000e-2(a) (1982) (hereafter the "PDA"). In contrast, on June 20, 1983, it was the rule in only one court that the PDA did prohibit an employer from offering such a health insurance plan. See Petition at 12. These cases show little "conflict" or "confusion," but a near unanimity of authority supporting the Company's position.

These lower court decisions alone make it clear that *Newport News* established a new principle of law within the meaning of *Huson*. The decisions of this Court demonstrate that, contrary to the EEOC's suggestions, the requirements for nonretroactivity are not so stringent that they can rarely be met. The language of *Huson* itself requires only that the principle of law established not be "*clearly* foreshadowed." 404 U.S. at 106 (emphasis added). In *United States v. Johnson*, 457 U.S 537, 551 (1982), cited by the EEOC, the Court noted that a ruling can establish a new principle of law not only by changing a uniformly followed rule, but also by overturning "a near-unanimous body of lower court authority . . . ."

In certain cases the Court has applied an even less demanding standard than this language would suggest. In *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, the Court refused to allow retroactive relief against an employer-run pension plan it held to be unlawful even though all but one court considering the precise issue involved had anticipated the Court's decision. *See* 463 U.S. at 1081. The facts here obviously present a much stronger case for nonretroactivity because the reverse of *Norris* is true in this case: nearly every court had supported the Company's position. *See also Allen v.*

State Board of Elections, 393 U.S. 544, 572 (1969) (barring retroactive relief because the issues in the case were complex and "subject to rational disagreement").

The EEOC argues that *Newport News* was also foreshadowed by its interpretative guidelines indicating how it would construe the PDA. EEOC Brief at 10-11. The EEOC asserts that these guidelines "would be given 'great deference' by the courts," which the Company "could have and should have foreseen." *Id.* at 11. The Company did not foresee this because in fact no court gave any deference to the EEOC's guidelines. These guidelines were not only implicitly rejected in every case holding for the employer, but were explicitly rejected in the following cases: *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F.2d 1469, 1480-81 (7th Cir. 1983), *vacated*, 724 F.2d 52; *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243, 1246 n.2 (9th Cir. 1982), *vacated*, 463 U.S. 1202 (1983); *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153, 159 (E.D. Mo. 1982); *EEOC v. Newport News Shipbuilding & Dry Dock Co.*, 510 F. Supp. 66, 70-71 (E.D. Va. 1981). Even in *Newport News*, neither the Fourth Circuit nor this Court did more than quote from the guidelines; neither decision purports to rely on the guidelines as support for the rule being announced. *See* 462 U.S. at 673-74 & nn.8-9; 667 F.2d at 449-50. These guidelines are entitled to no more respect now than given them in the past, and in particular, they are entitled to less respect than the numerous decisions specifically rejecting their interpretation of the PDA.

The EEOC also asserts that the PDA itself and rulings of this Court before *Newport News* foreshadowed that decision. EEOC Brief at 9-10. This argument is answered by the body of authority overturned in the *Newport News* ruling. If the law had been as clear as

the EEOC now suggests, surely the lower courts would have correctly anticipated this Court's decision instead of ruling to the contrary in nearly every case. The EEOC, like the court below, has confused the present with the past. A decision by this court may announce a clear rule, but it does not have the effect of rendering nonexistent the body of law that preceded it. As a matter of common sense, *Newport News* established a new principle of law by overturning the great weight of authority among the lower courts, and the decision by the court below holding to the contrary is inconsistent with *Huson*.

2. Retroactive Application of the Ruling in *Newport News* Would Produce an Inequitable Result in This Case.

The third factor in the *Huson* test directs a court to weigh "the inequity imposed by retroactive application" of the decision establishing the new principle of law. 404 U.S. at 107. The EEOC asserts that retroactive application of *Newport News* would not be inequitable because this case presents nothing more than an order requiring an employer to compensate its employees for lost back pay. EEOC Brief at 17. Therefore, the EEOC argues, failing to apply *Newport News* retroactively would destroy the presumption, established in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), that victims of discrimination should be made whole for the injuries they have suffered. EEOC Brief at 17.

However, the EEOC's argument is meritless because its premise is wrong: this is not a typical Title VII case. Retroactive relief will not simply return the Company's male employees to the position they would have occupied in the absence of a violation of the act, but will make them better off than if no violation had occurred. The key fact in this case, ignored by the

EEOC, is that dependent coverage under the Company's health insurance plan is funded by contributions both from the Company and the employees opting for this coverage. The Company could have increased the premiums for dependent coverage to defray the expenses it has now been ordered to pay, but the Company reasonably read the PDA not to require the imposition of these added costs on its employees. Nevertheless, the Company is now being forced to absorb all the added expenses of the insurance plan even though its employees have already enjoyed the benefits of a less expensive plan.

The EEOC attempts to explain away the inequity of this result by applying it to other Title VII cases, for example, the failure to hire a group of employees. A defendant can always argue, claims the EEOC, that "he would not have given victims as much (money or benefits) as he originally gave the nonvictims since that would have been too expensive." EEOC Brief at 16 n.16. However, this situation is not presented by this case, which does not concern two separate groups of employees. Instead, the valid comparison is within the same group of employees: between what they would receive if retroactive relief is ordered and what they would receive if it is denied. This case would be analogous to an action based on a failure to hire only if the court refused to deduct the plaintiffs' interim earnings from their back pay award and thereby permitted double recovery like that allowed here.

The special facts of this case bring it within the principle established in *Manhart* and *Norris*, and the opinion of the court below is inconsistent with these decisions. In each of these cases, the Court held that an employer-operated benefit plan was unlawful under Title VII, but it refused to permit retroactive relief because the plan was partially funded by employees' con-

tributions and because its holding could not have been anticipated by reasonable plan administrators. The Court recognized in both cases that an employer who has acted in good faith should not be forced to absorb a substantial, unanticipated liability arising out of a benefit plan for which it can have no matching income through employee contributions. This principle does not swallow up the *Albemarle* rule, as the EEOC fears, because it applies only to the small number of cases, like this one, where an employer-run benefit plan is forced to make additional payments because of a newly declared rule of law. Indeed, denying retroactive relief in this case is no more inconsistent with *Albemarle* than are *Manhart* and *Norris*.

CONCLUSION

For the foregoing reasons, and for the other reasons stated in the Company's petition, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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